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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 72-47, October Term, 1972

HAYDEN PUBLISHING COMPANY, INC. and
HAYDEN BOOK COMPANY, INC.,

Petitioners,

v.

VAN VALKENBURGH, NOOGER & NEVILLE, INC.,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Jurisdiction

For the reasons set out in the Argument, the Court does not have jurisdiction to review the Judgment of the New York Court of Appeals.

Questions Presented

1. Does the Supreme Court have jurisdiction to review a state court determination that petitioners violated the terms of a contract it was obligated to perform, when the judgment did not determine or pass upon a federal question?

2. Does the Supreme Court have jurisdiction to review an interlocutory decree of a state court, despite the fact that there isn't any pressing or practical reason for review before the case is completed?

A Statement of the Case

The Respondent is the author of a series of books on the fundamentals of electricity and electronics which are referred to in this brief as "the Author's books". The petitioner Hayden Book Company, Inc., is the publisher of the Author's books.[1] As in the opinion of the Court of Appeals in this case (A6)[2], the Respondent is referred to hereafter as "the Author" and the two Petitioners are referred to as "the Publisher". The agreement for the publication of the Author's books, made in 1954, provided that the Publisher was to have the exclusive right to publish and sell the books in the United States and Canada, and the Publisher agreed "to use its best efforts to promote their sale (R Exh. Vol. pp. 4, 5).[3]

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1. The Petitioner Hayden Publishing Company, Inc. is the owner of all of the stock of Hayden Book Company, Inc. and managed its affairs. The parent corporation was found liable for the misconduct of its subsidiary. Its liability is not in issue.

2. Numbers following the letter "A" in parentheses, refer to the pages of the Appendix attached to the Petition for Certiorari.

3. The pagination of the Record to the Appellate Division prepared by Petitioners is at best erratic. Volumes I, II and XVI and the Exhibit Volume each begin with page 1. One volume begins with pages A, B, etc. To avoid confusion, references in this brief are to the volumes as well as the pages of their Record and all references to the Record are preceded by the letter "R" (for example "R Vol. II, p. 16"). The volume of the Record containing exhibits is not numbered and is referred to in this brief as "(R Exh. Vol.)".

The Author's books were the Publisher's most successful ones and accounted for a large part of its income (A6). In 1962 the Author and Publisher discussed a new and later edition of the Author's books. The Publisher demanded a reduction in the Author's royalties as a condition to the publication of the new edition (A6). When it became clear that the Author would not accept a lower royalty rate, the Publisher hired Harry Mileaf, an editor, and three other people to prepare imitations of the Author's books on the very same subject as the Author's books (A6). The books prepared by Harry Mileaf and his three assistants are referred to hereafter as "the Mileaf books."

It required a staff of thirty, and at times forty, engineers, educators, artists and clerical workers to write and illustrate the Author's books, and it took two years to complete them (R Vol. I, pp. 20, 21). The Mileaf books were completed by Mileaf and his three assistants in less than a year and a half (R Vol. I, pp. 35, 36). Three of the men who worked on the Mileaf books had other full-time employment during the time they were working on the books. Only one of the four had a college degree (R Vol. I, p. 39). The prior "writing" experience of the four men who worked on the Mileaf books was in the preparation of technical pamphlets and manuals. They "collected" or "physically cut" the material for their manuals and pamphlets from other sources (R Vol. I, pp. 36, 37).

The Mileaf books, when produced, were similar in appearance to the Author's books and were published in [redacted] editions of the same kind and size (R Vol. I, pp. 41, 42). As the Trial Court found (R Vol. I, pp. 42, 43):

> "118. The material in both the Plaintiff's (Author's) books and the Mileaf books is presented in the

same manner by simple sequential steps, each step being a separate and generally self-contained unit of information. Each unit of information is presented on one page or multiple of a page, and each or, almost each, unit of information has one or more illustrations portraying the single or related subjects.'"[4]

* * *

"123. The subject matter of both Plaintiff's (the Author's) books and those edited by Mileaf is the same except that approximately one-fourth or one-fifth of the material in the Mileaf books relates to developments that were not in commercial application in 1955 or 1959 and those matters are not presented in the Plaintiff's (Author's) books."

* * *

"125. The context and content of the first four volumes of the Plaintiff's (the Author's) Basic Electricity is closely comparable to the first four volumes of (Mileaf's) Electricity 1-7 to such extent that they are,—as a unit,—interchangeable." (Matter in parentheses added)

The Trial Court found that the Publisher arranged for the preparation of the Mileaf books "to appropriate in whole or in part the market for (the Author's books) Basic Electricity and Basic Electronics and to avoid payment of

4. The Author's books were unique when the agreement for their publication was made. The Publisher's statement (at page 7 of its Petition) that it was publishing "about 40 books on electricity and electronics" with the same format, is inaccurate. It did not publish a single book with that format until after the Author's books were published. Throughout its statement of the facts, the Publisher relies on testimony it offered that was, for reasons that shall be indicated, rejected by the Trial Court. This Court will, of course, accept the findings of the Trial Court, affirmed by the state appellate courts, for the Publisher does not maintain that there isn't any evidence to support the findings but merely that the testimony it offered is entitled to greater weight. See *Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U.S. 287, 294.

the large royalties the Defendants (Publisher) were obligated to pay to the Plaintiff (the Author) on the sale of Plaintiff's (the Author's) books" (R Vol. I, p. 38).[5] The Trial Court also found that in furtherance of its plan to cheat the Author of its royalties, the Publisher deceived the Author with respect to its plans to publish the Mileaf books (R Vol. I, pp. 40, 41); it suppressed and suspended advertising of the Author's books (R Vol. I, pp. 50, 51); it used, to advertise the Mileaf books, the advertisements that were proven successful in selling the Author's books (R Vol. I, pp. 47-50); it directed its salesmen who had been selling the Author's books to sell the Mileaf books exclusively; it put the Author's books under the supervision of an inexperienced sales manager (R Vol. I, pp. 52-54); and it attempted to sell the Mileaf books to buyers who had been purchasing the Author's books (R Vol. I, pp. 52-54, 47). On the trial the Publisher offered perjured testimony and fraudulent exhibits to prevent the revelation of its conduct (R Vol. I, pp. 35, 37-38, 46, 51, 53-54). The New York Court of Appeals quoted with approval the following comment on the evidence of the Publisher's wrongdoing: "The astounding pattern of Publisher's conduct, as disclosed and documented by the record, is probably without parallel in publishing history * * *" (A7).

The Trial Court found that the Publisher's conduct violated a fiduciary obligation to the Author, enjoined

5. The Publisher states, at p. 10 of its Petition, that the finding was rejected by the Appellate Division. No record reference is given for that statement. The finding was not rejected, but as appears from the Court of Appeals' brief discussion of the facts (A6, 7), was affirmed. Under New York law, a trial court's findings will not be deemed reversed by implication, or by conclusions of the Appellate Division with which they are not in direct conflict. Cohen & Karger, Powers of The New York Court of Appeals (Revised ed.) §130, p. 539; New York Civil Practice Law and Rules, §5712 (c)(2).

the sale of the Mileaf books, and directed the Publisher to account to the Author for the damage sustained as a result of the Publisher's wrongdoing (A25-32). The Publisher appealed to the Appellate Division of the Supreme Court of the State of New York. That Court held that a publisher does not have a fiduciary obligation to its author, but that the Publisher in this case breached its agreement "to use its best efforts to promote the sale" of the Author's books (A8, 19-24). The Appellate Division changed the permanent injunction granted by the Trial Court to a temporary injunction, to terminate when the amount of the Author's damages was determined (A 11, 16). The Publisher then secured leave of the Appellate Division to appeal to the New York Court of Appeals. (Record on appeal to the Court of Appeals, pp. 15, 17). The Court of Appeals affirmed the Judgment of the Appellate Division that the Publisher was in breach of a "specific undertaking of the contract" with the Author (A10).

ARGUMENT

POINT I

The petition for certiorari should be denied, for the decision of the state court was based upon adequate and independent state grounds.

This Court will not review a state court Judgment that rests on an adequate and independent state ground. The mere fact that a federal question was raised in the state court or that it was passed upon by the state court is not a reason for the Court's assuming jurisdiction of a cause. In this case the Petitioner-Publisher seeks to review a judgment of a Court which did not determine, and did not have jurisdiction, in this case, to determine, the federal question that the Publisher raises in its petition for certiorari.

Before this Court may exercise jurisdiction to review a state court judgment, it must appear affirmatively that the federal question was a *necessary* ground of the decision to be reviewed. *Lynch* v. *New York*, 293 U.S. 52; *Honeyman* v. *Hanan*, 300 U.S. 14, 18, 19; *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U.S. 206, 212-213; *Malinski* v. *New York*, 324 U.S. 401, 412; *Herb* v. *Pitcairn*, 324 U.S. 117; *Wolfe* v. *North Carolina*, 364 U.S. 177, 196; *Bell* v. *Maryland*, 378 U.S. 226. The Publisher has not shown, for indeed it could not have shown, that the decision of the Court below was founded on a determination of the federal question discussed in the petition for certiorari.

The bases for the decisions of the New York appellate courts in this action are set forth in their opinions. The Appellate Division of the Supreme Court of the State of

New York, in modifying the judgment of the trial court, wrote in a *per curiam* opinion (A20):

> "We find and conclude that this was a purely commercial relationship and a purely commercial transaction. The action more properly may be considered an action for breach of contract with demonstrated failure by defendants to use their 'best efforts,' as they agreed to do under the publishing contract, for the continued promotion and sale of plaintiff's books."

The New York Court of Appeals, in commenting on and affirming the judgment of the Appellate Division, said:

(A8)

> "It found * * * that the publisher had breached its contractual undertaking to use its 'best efforts' in promoting the Author's books and hence was answerable in the money damages appropriate to a breach of contract."

(A10-11)

> "Thus the only issue that may be considered in this form of appeal is whether it could be found, as a matter of law, on the record that there was no fiduciary relationship; that there was a breach of a specific undertaking of the contract; and that money damages were a sufficient measure for the breach (see Cohen and Karger, Powers of the N.Y. Court of Appeals, §88 *et seq.*). Not any of those questions requires reversal here as a matter of law."

It is evident that the state courts did not base their decisions in this case on a federal question. The judgment of the New York Court of Appeals that the Publisher seeks to review, determined the questions of law outlined in the last excerpt from its opinion. Those questions involved issues only of state law.

The Publisher's appeal to the New York Court of Appeals was not taken as a matter of right, for the judgment appealed from was not a final judgment. The appeal was taken by permission of the Appellate Division. (Record on Appeal to Court of Appeals, p. 17) The order granting permission to appeal limited the Court of Appeals to a consideration of the issues of law decided by the Appellate Division, which were: "* * * that there was no fiduciary relationship (between Publisher and Author); that there was a breach (by the Publisher) of a specific undertaking of the contract; and that money damages were a sufficient measure for the breach * * *" (Matter in parentheses added) (A10, 20). As the Court of Appeals stated in its opinion, it did not have jurisdiction to consider any other question on the appeal (A10). The Court of Appeals therefore did not determine and could not have determined the federal questions relating to violation of the anti-trust or anti-monopoly laws, presented in the petition for certiorari. (Cf. pp. 19-23 of the petition for a writ of certiorari.)

The Publisher maintains that the Court of Appeals in holding that the Publisher violated its agreement to promote the Author's books, impliedly recognized the right of an author to prevent his publisher from publishing competing books. Such an agreement, the Publisher argues, would violate federal anti-monopoly laws. The courts below did not explicitly or implicitly recognize the right of a publisher and author to suppress competition by an agreement between them. The courts found merely that the specific conduct of which the Publisher in this case was guilty, was a breach of a particular provision of the agreement between

the Publisher and the Author.[6] The conduct that the Court found was a violation of the Publisher's promise to use its best efforts to promote the sale of the Author's books is set out at pages 3 to 5 of this brief. There can be little doubt of the correctness of the decision that one who appropriates the market for a book and suppresses advertising for the book, is not using his best efforts to advance it. And it is not, in order to reach that conclusion, necessary to pass on the question, and the Court below did not pass on the question of whether there is a violation of "the Sherman Antitrust Act or * * * a doctrine of patent and copyright monopoly mis-use established by the decisions of this Court or a federal public policy favoring free competition reflected thereby, for a statutory copyright proprietor to restrict its publisher licensee, by express or implied agreement in a contract licensing the proprietor's works to the publisher for sale in interstate and foreign commerce, from publishing and selling in such commerce other non-infringing works on the same educational subjects as the licensed works which are 'manifestly harmful' competition to the licensed works' (Petition for Certiorari at p. 3).

The determination that certain conduct of a party is a breach of its written promise to another does not ordinarily involve the adjudication of some vital constitutional or federal right. Even if we accept the Publisher's claim that the court below had to consider and decide a federal question in reaching its judgment, the mere fact that a federal

6. To magnify the importance of the federal issue that it seeks to present, the Publisher states that the Publisher's undertaking to use its best efforts to sell its author's books is "common" (Petition for a Writ of Certiorari at pp. 5, 16). There isn't any evidence in the record to support the statement, and to the writers' knowledge, the statement is incorrect.

question may have been involved in the decision of a question of state law does not convert the state issue into a federal question that this Court may consider.

In *Black* v. *Cutter Laboratories,* 351 U.S. 292, the petitioner sought review of the judgment of a state court determining the meaning of the term "just cause" in a labor union contract. The petitioner contended, with justification, that the decision of the contract question raised First and Fourteenth Amendment questions of some importance. Mr. Justice Clark, speaking for the majority of the Court in *Black* v. *Cutter Laboratories,* said:

351 U.S. at p. 298:

> "* * * it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Herb* v. *Pitcairn,* supra (324 U.S. 117); *Williams* v. *Kaiser,* 323 US. 471, 477." (Matter in parentheses added.)

351 U.S. at pp. 299, 300:

> "We believe that the Supreme Court of California construed the term 'just cause' * * *. As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. See *Stembridge* v. *Georgia,* 343 U.S. 541, 547, and cases cited. Cf. *United States* v. *Rumely,* 345 U.S. 41. It follows that the writ must be Dismissed."

See also *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74.

POINT II

The order of the New York Court of Appeals that petitioners ask the Court to review is not a final judgment within the meaning of 28 U.S.C. Section 1257.

The Petitioners maintain that jurisdiction to review the judgment of the state court is conferred upon this Court by the statute 28 U.S.C. §1257 (3) (Petition for Certiorari at p. 2). That section provides that "final judgments or decrees rendered by the highest court of a State * * * may be reviewed by the Supreme Court * * *". There cannot be any question that the judgment of the New York Court of Appeals, that Petitioners seek to review, is not a final, but an interlocutory, judgment.[7] It affirms a judgment granting a temporary injunction (that is no longer in effect) and directing an accounting upon which final judgment is to be entered (A3, 4, 15-18, 25-32). In the court below the Publisher recognized that the judgment is an interlocutory judgment, and the Appellate Division characterized it as such (A19, 17).

As used in the statutes defining appellate jurisdiction: "* * * a decree is final for the purposes of an appeal to this Court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I. M. & S.R.R. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. The judgment of the Court of Appeals in this case does not meet that test. It provides for an accounting to be filed by the Publisher, for the appoint-

7. There is no reference in the Petition for Certiorari to the fact that the order Petitioners ask the Court to review is interlocutory.

ment of a Referee to hear issues with respect to the accounting, and for a judgment to be based upon the account as settled (A29-31, 15-18, 2-4). The Publisher filed an accounting and hearings on the Author's objections to the account are pending.

There is of course no absolute right to review by this Court, and Congress limited the Court's jurisdiction to consider appeals only from final rulings in state court litigation. Mr. Justice Frankfurter wrote for the Court in *Cobbledick* v. *United States*, 309 U.S. 323, 326:

> "In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality —the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in §128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system * * *"

The Court, on occasion, relaxed the rule with respect to finality when there was a practical necessity for deciding a separate and independent federal question, before the parties are subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question * * * is postponed" *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 558.[8] This obviously is not such a case.

8. Cf. *Forgay* v. *Conrad*, 6 How (U.S.) 201; *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362; and *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, in which the Court permitted review of judgments providing for an accounting, because of separate provisions of the judgments directing the immediate delivery of property, and compliance with those provisions of the judgments would have prejudiced the petitioners' rights.

The parties had a long and complex litigation, lasting 58 days, before the accounting was ordered to determine the damages sustained by the Author. There isn't any preliminary federal question, or any federal question that should be reviewed, before the Publisher's account is settled and final judgment entered.

Conclusion

For the reasons outlined, the petition for a writ of certiorari should be denied.

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